IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL NO. 276 OF 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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DEPUTY CONSERVATOR OF FOREST & ORS. - Appellant(s)
Versus
VINODBHAI MULJIBHAI PATEL - Respondent(s)

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Appearance :
MR. DIPEN DESAI, AGP for Appellant(s) : 1 - 3.
MR. M.T.M. HAKIM for MR. R.K.MANSURI for Respondent(s).

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 13/09/2006

ORAL JUDGMENT

The State, being aggrieved by the Judgement and Decree dated 31st August, 2004 passed in Civil Appeal No.3 of 2004 by the learned Extra Assistant Judge, District:Sabarkantha, at Himmatnagar, decreeing the suit

while setting aside the judgement and decree passed by the learned Civil Judge (S.D.), on 29th November, 2003 in Regular Civil Suit No.5 of 1997, is before this Court.

2. The appeal has been admitted for hearing the parties on 31st July, 2006 on the following substantial question of law:

> *"Whether on the facts and in the circumstances of the case, after issuance of the Notification under Sec.35 of the Indian Forest Act, whether the land in dispute over which the plaintiff claims title and possession would vest free from all encumbrances in the State of Gujarat in accordance with the provisions contained in Gujarat Private Forest (Acquisition) Act, 1972 (Gujarat Act No.14 of 1973)?"*

3. The case of the plaintiff before the learned trial Court was that in exercise of the powers conferred by Sub.section-(1) of Section-35 of the Indian Forest Act, 1927, in its application to the State of Bombay, a Notification dated 9th September, 1954 was issued bearing No.PRF,1054/48452-J. According to them, particular land, well described in the Notification, was declared as forest. The Government produced Exh.81, a notification issued by the Agriculture, Forests and Cooperation Department, submitting, *inter alia*, that in exercise of

the powers conferred by Sections 4 and 17 of the Indian Forest Act, in its application to the State of Gujarat, the State has declared and decided to constitute the land in the villages of Himmatnagar Taluka, Sabarkantha District specified in the Schedule appended thereto as reserved forest. Item No.1 of the Schedule refers to Village-Gorwada. The land is bearing Survey No.156, admeasuring 351 Acres and 26 Gunthas, equivalent to 142 Hectares and 31 Ares. The boundaries of the said land declared to be forest are given in Column No.6.

3.1 The plaintiff's case is that the land in dispute admeasuring 8 Hectares 90 Ares and 3 sq. mtrs. and 2 Hectares 89 Ares and 35 sq. mtrs. belongs to the plaintiff, but, the defendants are interfering with the plaintiff's possession and are not allowing him to enter upon his land for carrying on agricultural operations. He prayed for an injunction against the State Government.

3.2 The defendants appeared in the Court and submitted that in accordance with the notification (Exh.81), the land has been declared as forest land and in accordance with Section-35 of the Indian Forest Act, 1927 (“the Act” for short), they are entitled to take preventive action against the plaintiff. It was also submitted that the plaintiff can be restrained by them

from carrying on any non-forest activity. They also submitted that they were not interfering with the possession of the plaintiff, but, simply to protect the grown up trees and the forest and to maintain the ecological conditions, they have put fence around the agricultural land of the plaintiff. They submitted that as they were not causing any interference to the right of the plaintiff, the suit deserved to be dismissed.

3.3 The learned trial Court, after recording the evidence and hearing the parties, held that the land, well described in the suit, belongs to the plaintiff, the plaintiff is entitled to carry on his agricultural operations on it, but, as the defendants are not interfering with the plaintiff's possession, injunction could not be granted in favour of the plaintiff.

3.4 The plaintiff, being aggrieved by the said judgement and decree and refusal of the relief, filed regular appeal under Section-96 of the Code of Civil Procedure. The learned first Appellate Court, after hearing the parties, held that in view of the findings recorded by the learned trial Court and the fact that fence has been put around the property belonging to the plaintiff, it would amount to interference with the property's right the plaintiff would be entitled to an

injunction. It, accordingly, issued the injunction, as prayed for in paragraph-6(A) of the plaint. Being aggrieved by the said judgement and decree, the State has come up in an appeal, which has been admitted for hearing on the above referred question.

4. Mr. Dipen Desai, learned Counsel for the State, submitted that though the Notification, Exh.81, refers to 351 Acres and 26 Gunthas of land, but, from the facts, it would clearly appear that the Notification was to cover the entire Survey No.156, admeasuring 517 Acres and 30 Gunthas. He submits that improper description in the Notification (Exh.81) would not act against the interest of the State Government and the State, in accordance with Section-35 of the Act, would be entitled to restrain the plaintiff from carrying on any non-forest activities. His further submission is that the State or the Forest Department, in fact, is not interfering with the plaintiff's right of ownership or the possessory title or possession, but, to protect the forest, they have put fence around the land in dispute. He submits that the suit has been illegally decreed.

5. Mr. M.T.M. Hakim, learned Counsel for the respondent, on the other hand, submits that if the Notification refers to 351 Acres and 26 Gunthas of land

only, then, by no stretch of imagination, it can be held that it would apply to the remaining land of Survey No.156, admeasuring 165 Acres and 13 Gunthas, of which the present land is also a part. He submits that by putting fence all around the property, when the plaintiff is not being permitted to enter upon the land, the action of the appellant-State would be an action illegally restraining the plaintiff from entering upon his land. He also submits that if a Notification under Section-35 of the Act has never been issued or the Notification issued under Section-4, read with Section-17 of the Act, does not include the land in dispute, then, the appellants would not be entitled to interfere with the plaintiff's possession.

6. Section-4 of the Act authorises the State Government to issue a Notification to constitute any land into a reserved forest. Section-17 of the Act provides that if any order is passed under Sections 11, 12, 15 or 16, then, an appeal would lie to the Appellate Authority. Section-35 of the Act provides for protection of forests for special purposes. It authorises the Government to issue a Notification in the Official Gazette to regulate or prohibit in any forest or waste-land particular activities if such regulation or prohibition appears necessary for the purposes well described in Sub.section-

(1) of Section-35. Sub.section-(3) of Section-35 provides that no Notification shall be made under Sub.section-(1), until after the issue of a notice to the owner of such forest or land calling on him to show cause, within a reasonable period to be specified in such notice as to why such Notification should not be made and until his objections, if any, and any evidence he may produce in support of the same, have been heard by an officer duly appointed in that behalf and have been considered by the State Government.

7. Undisputedly, the Notification under Section-35 relating to 165 Acres and 13 Gunthas land has not been issued. The submission of the State is only that 351 Acres and 26 Gunthas of Exh.81 should be read as 517 Acres and 30 Gunthas. I am afraid that I cannot accept this construction put forth by the learned counsel for the State.

8. It is to be noted that Section-34(A) to Section 37 of the Act stands repealed with effect on and from the appointed day of coming into force of the Gujarat Act No.14 of 1973 (The Gujarat Private Forests (Acquisition) Act, 1972). However, the proviso appended to Section-23 of the Gujarat Act No.14 of 1973 provides that such repeals shall not affect the continuance in force after

the appointed day of any Notification issued under any of these sections before their repeal, until superseded by the State Government.

A fair reading and understanding of Section-23 of the Gujarat Act No.14 of 1973 would make it clear that from the appointed day, that is, 30th June, 1973, the provisions contained in Section-34(A) to Section-37 shall stand repealed, but, any action taken under Section-34(A) to Section-37 of the Act before 30th June, 1973 shall be saved. The proviso would help and assist the Government if the State is in a position to convince the Court that prior to 30th June, 1973, the State had issued any Notification relating to 165 Acres and 13 Gunthas of land under Section-35 of the Act. If any action relating to the said land admeasuring 165 Acres and 13 Gunthas was not taken by the State prior to 30th June, 1973 under the unamended Forest Act, then, in absence of any action, nothing could be saved.

9. Section-35, for its application, has a precondition that there must be a Notification and the Notification can be issued only after giving an opportunity of hearing. If no Notification is issued under Section-35 encompassing 165 Acres and 13 Gunthas, of land, then, Section-3 of the Gujarat Act No.14 of 1973

would not be available for help to the State Government. Section-3 of the Gujarat Act No.14 of 1973 reads as under:

> ***"3.*** *(1) Notwithstanding anything contained in any law for the time being in force or in any settlement, grant, agreement, usage, custom or any decree or order of a Court or any Tribunal or any other document, with effect on and from the appointed day, all private forests in the State of Gujarat shall vest, free from all encumbrances, in, and shall be deemed to be, with all rights in or over the same or appertaining thereto, the property of the State Government; and all right, title and interest of the owner or any person other than the Government subsisting in any such forest on the said day shall be deemed to have been extinguished.*
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> *(2) Nothing contained in sub-section (1) shall apply to so much extent of land comprised in any private forest as is held by the owner or tenant lawfully under his personal cultivation on the appointed day and as is not in excess of the ceiling area within the meaning of the expression in the Gujarat Agricultural Lands Ceiling Act, 1960 for the time being in force or any building or structure standing thereon or appurtenant thereto.*
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> ***Explanation. -*** *In this section, the expressions `tenant' and `personal cultivation' shall have the same meanings as they have in any law*

relating to tenancies of agricultural lands for the time being in force in the State of Gujarat."

Sub.section-(1) of Section-3 relates to vesting of private forests in the State Government, but, Sub.section-(2) of Section-3 works as a proviso or in any case, when it starts with a *non obstante* clause, then, it is to be held that Sub.section-(1) would not apply to the land falling under Sub.Section-(2), that is, the land held by the owner or tenant lawfully under his personal cultivation on the appointed day if it is not in excess of the ceiling area within the meaning of the expression in the Gujarat Agricultural Lands Ceiling Act, 1960 for the time being in force or any building or structure standing thereon or appurtenant thereto.

10. Both the Courts have recorded a finding of the fact that the land in dispute is agricultural land. If that be so, the land would not vest in the State Government despite coming into force of Section-3 of the Gujarat Act No.14 of 1973. Sub.section-(1) of Section-3 of the said Act would apply to the land which is not an agricultural land. Under the circumstances, in my considered opinion, the submission of the State Government that the land would vest, free from all encumbrances, in the State of Gujarat in accordance with

the provisions contained in the Gujarat Private Forests (Acquisition) Act, 1972, would not be a proper argument.

11. At this stage, Mr. Desai, learned Counsel for the appellants, submits that in accordance with the observations made by the Supreme Court in its judgement dated 12th December, 1996 in the matter of ***T.N.Godavarman Thirumulkpad vs. Union of India & Ors.*** Writ Petition (Civil) No.202 of 1995, this Court must say that as the land is recorded as forest land in the revenue records, the State is entitled to take action under Section-35 of the Act.

12. I am sorry that I am not agreeing to this argument because since after 1973, for the purposes of the State of Gujarat, Section-35 of the Act is not in the statute book. If Section-35 is not in the statute book, the State cannot be allowed to take any action under Section-35 and if the land has not vested in the Government under Section-3(1) of the Gujarat Act No.14 of 1973 and is saved from the mischief of Sub.section-(1) of Section-3, because of operation of Sub.section-(2) of Section-3, then, the State cannot take any action to control or regulate the use of the property.

13. Under the circumstances, it is held that as no

Notification under Section-35 of the Act has been issued in relation to the land in dispute, the same would not vest in the Government of Gujarat in accordance with the provisions contained in the Gujarat Private Forests (Acquisition) Act, 1972, i.e. Gujarat Act No.14 of 1973. The injunction granted against the State is based on due appreciation of evidence. The appeal deserves to and is, accordingly, dismissed. It is, however, made clear that any observation made by this Court in relation to the entire area of 165 Acres and 13 Gunthas is for the purposes of this appeal only because nobody knows as to what other steps have been taken by the State Government for other land. I also make it clear that the State would be entitled to take appropriate action in accordance with law. A decree be drawn accordingly. No costs.

[R.S.Garg, J.]

*kamlesh**